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CHRISTINA SANCHEZ

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SECOND IMAGE, INC., a California
corporation

Plaintiff,

vs.

RON SIN PHOTOCOPY, INC., a California
Corporation; CHRISTINA SANCHEZ, an
individual; and DOES 1-10

Defendants.

Case No. C 07 5242 PJH

**CHRISTINA SANCHEZ' AMENDED
NOTICE OF MOTION AND MOTION TO
DISMISS FIRST AMENDED
COMPLAINT; POINTS AND
AUTHORITIES IN SUPPORT
[FRCP 12(b)(1) and 12(b)(6)]**

**Date: February 27, 2008
Time: 9:00 a.m.
Dept.: 3
Hon. Phyllis J. Hamilton**

AND RELATED CROSS-CLAIM.

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 27, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3, 17th Floor of the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, defendant CHRISTINA SANCHEZ ("Defendant Sanchez" or "Sanchez") will move the Court to dismiss the First Amended Complaint as to defendant Sanchez.

Defendant Sanchez seeks dismissal of the First Amended Complaint on the grounds that this Court lacks subject matter jurisdiction, Federal Rule of Civil Procedure 12(b)(1),

1 and on the grounds that the First Amended Complaint fails to state a claim upon which relief
2 can be granted against defendant Sanchez, Federal Rule of Civil Procedure 12(b)(6).

3
4 DATED: January 17, 2007

CESARI, WERNER AND MORIARTY

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6 BY _____

7 STEPHEN L. DAHM
8 Attorneys for Defendant
9 **CHRISTINA SANCHEZ**

1 **POINTS AND AUTHORITIES**

2 **RELEVANT ALLEGATIONS IN THE FIRST AMENDED COMPLAINT**

3 Paragraph 16 of the First Amended Complaint alleges that plaintiff's dedicated
4 username and password grants the holder thereof access to a portion of plaintiff's private
5 website created to host records associated with plaintiff's services for that particular client.
6 One client cannot gain access to another client's portion of plaintiff's private website, or any
7 records hosted thereon.

8 Paragraph 18 of the First Amended Complaint alleges that plaintiff provided
9 defendant Sanchez with a username and password, and informed her that they were
10 confidential.

11 Paragraph 19 of the First Amended Complaint alleges that defendant Ronsin
12 Photocopy, Inc. ("defendant Ronsin" or "Ronsin") improperly accessed plaintiff's private
13 website using the username and password that plaintiff had provided to defendant Sanchez.
14 Once on plaintiff's private website, defendant Ronsin breached plaintiff's security and
15 accessed restricted and private data, and further used the unlawful access to represent to
16 plaintiff's current and potential customers that plaintiff's records were not secure, and that
17 Ronsin provided greater security.

18 Paragraphs 20 through 23 of the First Amended Complaint allege that the defendants
19 entered into an agreement to unlawfully gain access to plaintiff's trade secrets, to pilfer
20 plaintiff's clients, and to obtain an unfair business advantage over plaintiff.

21 Paragraphs 74 through 76 of the First Amended Complaint allege that Sanchez had a
22 duty to plaintiff to maintain the confidentiality of the username and password provided to her
23 by plaintiff, and that Sanchez breached that duty by exceeding the scope of her authorized
24 access to plaintiff's private website, and/or provided her username and password to Ronsin,
25 so as to facilitate their unauthorized access to plaintiff's private website, and that plaintiff
26 was damaged as a result.

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1 **STATUTORY AUTHORITY**

2 Federal Rule of Civil Procedure 12(b)(1) provides that a party may assert lack of
3 subject matter jurisdiction in response to a claim for relief in any pleading by means of a
4 motion.

5 Federal Rule of Civil Procedure 12(b)(6) provides that a party may assert failure to
6 state a claim upon which relief can be granted in response to a claim for relief in any
7 pleading by means of a motion.

8 18 U.S.C. Section 1030(a)(2)(C) provides that whoever intentionally accesses a
9 computer without authorization or exceeds authorized access, and thereby obtains
10 information from any protected computer if the conduct involved an interstate or foreign
11 communication shall be punished as provided in Section 1030(c).

12 18 U.S.C. Section 1030(a)(4) provides that whoever knowingly and with intent to
13 defraud, accesses a protected computer without authorization, or exceeds authorized access,
14 and by means of such conduct furthers the intended fraud and obtains anything of value,
15 unless the object of the fraud and the thing obtained consists only of the use of the computer
16 and the value of such use is not more than \$5,000 in any one-year period, shall be punished
17 as provided in Section 1030(c).

18 18 U.S.C. Section 1030(a)(6)(A) provides that whoever knowingly and with intent to
19 defraud traffics (as defined in section 1029) in any password or similar information through
20 which a computer may be accessed without authorization, if such trafficking affects interstate
21 or foreign commerce, shall be punished as provided in Section 1030(c).

22 15 U.S.C. Section 1125(a)(1) provides that any person who, in connection with any
23 goods or services, uses in commerce any word, term, name, symbol or device, or any
24 combination thereof, or any false designation of origin, false or misleading description of
25 fact, or false or misleading representation of fact which (a) is likely to cause confusion, or to
26 cause mistake, or to deceive as to the affiliation, connection, or association of such person
27 with another person, or as to the origin, sponsorship, or approval of his or her goods, services
28 or commercial activities by another person, or (b) in commercial advertising or promotion,

misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

JUDICIAL AUTHORITY AND ARGUMENT

I. The Court Does Not Have Subject Matter Jurisdiction Over Plaintiff's Section 1030(a)(2)(C) Claim, and Plaintiff Has Not Stated a Claim Upon Which Relief Can Be Granted, Against Sanchez Because Sanchez's Alleged Conduct Did Not Involve An Interstate or Foreign Communication

The gravamen of the Section 1030(a)(2)(c) claim against Sanchez is that she intentionally or negligently provided Ronsin with her username and password, giving Ronsin unauthorized access to plaintiff's secure website. The First Amended Complaint does not allege that this "conduct" by Sanchez "involved an interstate or foreign communication," as required by Section 1030(a)(2)(C). The First Amended Complaint clearly alleges at paragraphs 3 and 4 that Ronsin and Sanchez are both residents of California. Paragraph 18 alleges that plaintiff provided Sanchez with a username and password, and that action appears to have occurred in California. Paragraph 74 does not allege that Sanchez's action in providing her username and password to Ronsin occurred anywhere other than in California.

Plaintiff has the burden of alleging facts on which its alleged federal claim is based, see *Hoye v. Sullivan*, 995 F.2d 990, 991 (9th Cir.1993). Since plaintiff does not allege in the First Amended Complaint that Sanchez's conduct in providing Ronsin with the username and password was conduct which involved an interstate or foreign communication, plaintiff has not pled a basis for federal subject matter jurisdiction, or a claim under which relief can be granted, under Section 1030(a)(2)(C).

II. There Is No Subject Matter Jurisdiction and No Claim Upon Which Relief Can Be Granted Under Section 1030(a)(4) Because the First Amended Complaint Does Not Allege that Sanchez Obtained Anything of Value by Means of Her Alleged Conduct

There is no allegation in the First Amended Complaint that Sanchez obtained anything of value by means of her alleged provision of plaintiff's username and password to Ronsin. "The plain language of section 1030(a)(4) emphasizes that more than mere

1 unauthorized use is required: the ‘thing obtained’ may not merely be the unauthorized use.”
 2 *U.S. v. Czubinski* 106 F.3d 1069, 1078 (1st Cir. 1997). The First Circuit in *Czubinski* then
 3 cited the legislative history of Section 1030 in which it was stated “The acts of fraud we are
 4 addressing in proposed section 1030(a)(4) are essentially thefts in which someone uses a
 5 federal interest computer to wrongly obtain something of value from another...” *Id.* at 106
 6 F3d 1069, 1078. Since plaintiff has not alleged that Sanchez obtained anything of value by
 7 intentionally or negligently providing Ronsin with her username and password, plaintiff fails
 8 to plead federal subject matter jurisdiction, and fails to state a claim upon which relief can be
 9 granted, under Section 1030(a)(4).

10 **III. The Court Has No Subject Matter Jurisdiction, and Plaintiff Has Failed to**
 11 **State a Claim Upon Which Relief Can Be Granted, Under Section**
 12 **1030(a)(6)(A)**

13 Paragraphs 74 through 76 of the First Amended Complaint allege negligent conduct
 14 on the part of defendant Sanchez. Negligence is “the doing of some act a reasonably prudent
 15 person would not do, or the failure to do something a reasonably prudent person would do . .
 16 . it is the failure to use ordinary care under the circumstances in the management of one’s
 17 person or property, or of agencies under one’s control.” *LaVine v. Clear Creek Skiing Corp.*,
 18 557 F.2d 730, 734-35 (10th Cir. 1977). Paragraphs 74 through 76 do not allege that Sanchez
 19 “knowingly and with intent to defraud” provided her username and password to Ronsin, as
 20 required to obtain relief under Section 1030(a)(6)(A). Therefore paragraphs 74 through 76 do
 21 not plead facts on which the Court can base federal subject matter jurisdiction, and do not
 22 state a claim under which relief can be granted under section 1030(a)(6)(A).

23 **IV. Plaintiff’s State Law Conspiracy Claim Is Not a Basis for Liability Under**
 24 **Section 1030**

25 In California, civil conspiracy is not a legal cause of action. To sustain a claim of
 26 conspiracy, plaintiff must plead and prove that Sanchez committed an underlying tort.
 27 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 992 (9th Cir.2001), opinion amended on
 28 denial of rehearing, 275 F.3d 1187. The torts alleged in the First Amended Complaint are all

1 common law torts, to which California law would apply. Therefore plaintiff can't use the
2 conspiracy allegations to create federal subject matter jurisdiction.

3 Furthermore, the general allegations of conspiracy at paragraphs 20 through 23 of the
4 First Amended Complaint are insufficient to state a claim that Sanchez can be liable for civil
5 conspiracy. Plaintiffs do not allege that Sanchez had knowledge of Ronsin's alleged plan to
6 hack into other of plaintiff's customer's accounts, unlawfully access patient records, make
7 false representations to plaintiff's customers, and gain access to plaintiff's non-public and
8 proprietary information. "The sine qua non of a conspiratorial agreement is the knowledge
9 on the part of the alleged conspirators of its unlawful objective and their intent to aid in
10 achieving that objective. [Citations] ...mere knowledge, acquiescence, or approval of an act,
11 without cooperation or agreement to cooperate is insufficient to establish liability." *Kidron*
12 *v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582. Without an allegation of
13 specific intent to commit the state law torts, plaintiff has not stated a claim under which relief
14 can be granted under California law. Hence, the conspiracy allegations do not allege facts
15 under which relief can be granted under Rule 12(b)(6).

16 **V. Plaintiff Has Not Pled Facts Which If Proven Would Subject Sanchez to**
17 **Federal Subject Matter Jurisdiction, Nor Has Plaintiff Stated a Claim Upon**
18 **Which Relief Could Be Granted Against Sanchez, Under Section 43(a) of the**
Lanham Act

19 False advertising injury under the Lanham Act must allege among its elements "that
20 defendant caused its falsely advertised goods to enter interstate commerce." See *Rice v. Fox*
21 *Broadcasting Co.*, 330 F.3d 1170, 1180 (9th Cir. 2003). In paragraph 40 of the First Amended
22 Complaint plaintiff alleges that defendant Ronsin conducts business nationwide and services
23 clients throughout the United States, utilizing channels of interstate commerce. But plaintiff
24 makes no such allegations concerning defendant Sanchez. Although plaintiff alleges at
25 paragraph 75 of the First Amended Complaint that Sanchez exceeded the scope of her
26 authorized access to plaintiff's username and password, and/or provided her username and
27 password to Ronsin, nowhere does plaintiff allege that Sanchez caused its falsely advertised
28 goods to enter interstate commerce. Therefore the First Amended Complaint does not allege

1 federal subject matter jurisdiction under the Lanham Act as to Sanchez, nor does it state a
2 Lanham Act claim upon which relief can be granted against Sanchez.

3
4 **CONCLUSION**

5 On the basis of the facts and authorities cited herein, defendant Sanchez prays that the
6 court grant her motion, and that the complaint be dismissed as to her. Plaintiff is not without
7 remedy, as it can bring its claims against Sanchez in California state court.
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10 DATED: January 17, 2007

CESARI, WERNER AND MORIARTY

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12 BY: /S/

13 STEPHEN L. DAHM
14 Attorneys for Defendant
15 **CHRISTINA SANCHEZ**
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